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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 248

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. PRICE, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on April 15, 1952, by the United States Court of Claims.

OPINION BELOW

The first opinion of the Court of Claims on entitlement (R. 12-25) is reported at 100 F. Supp. 310. The opinion of the Court of Claims on the amount of the judgment (R. 31-35) is reported at 104 F. Supp. 99.

JURISDICTION

The judgment of the Court of Claims was entered on April 15, 1952 (R. 36). Respondent's motion

to amend the judgment was denied on May 6, 1952 (R. 37). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether service in the militia before 1916 constitutes service in the "federally recognized National Guard" for the purpose of determining retired pay under Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory provisions and regulations are set forth in the Appendix, infra, pp. 16-44.

STATEMENT

Respondent was a member of the Pennsylvania National Guard until March 23, 1933. He applied for retirement benefits under Title III of P.L. 810, 80th Cong., 2d Sess., the Army and Air Force Vitalization and Retirement Equalization Act, Act of June 29, 1948, 62 Stat. 1081, which, for computing the required twenty years Federal service for retirement purposes, authorized the inclusion of service in "the federally recognized National Guard prior to 1933" (R. 9, 12, 13). He did not have the requisite twenty years of Federal service unless his service as an officer in the Pennsylvania National Guard prior to June 3, 1916, during which period he attended drills, target practices, and summer encampments, constituted "federal service".

The Adjutant General, Department of the Army, rejected the claim on the ground that National Guard service prior to June 3, 1916, the date of enactment of the National Defense Act, 39 Stat. 166, could not be credited for retirement purposes because it was not Federal service within the meaning of the 1948 Act (R. 9-10, 13, 14). Respondent thereupon brought suit in the Court of Claims which held, on the stipulated facts, in an opinion rendered October 2, 1951, Judge Madden dissenting (R. 24-25) that service after the passage of the Dick Act of 1903, 32 Stat. 775,[1] must be treated as federally recognized National Guard service for purposes of retirement under the 1948 Act (R. 12-24). On receipt of the report of the General Accounting Office showing the amount due on the basis of the court's opinion, and deduction of a pension, judgment was entered in favor of respondent in the amount of $2,565.55 on April 15, 1952 (R. 36). Respondent's motion to amend the judgment was denied on May 6, 1952 (R. 37).

REASONS FOR GRANTING THE WRIT

Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948 provides retired pay for Army and Air Force personnel who attain the age of 60 years after at least 20 years of satisfactory Federal service. For this purpose, Section 306(c)(3) defines "Federal service" as including service in "the federally recognized Na-

[1] No claim was made for service in the National Guard prior to January 21, 1903, when the Dick Act was passed (R. 7, 12).

tional Guard prior to 1933" (App., *infra,* p. 18).[2] The Court of Claims held that service in the National Guard or Organized Militia between 1903, when the Dick Act was enacted, and June 3, 1916, when the National Defense Act of 1916 became law, constituted service in "the federally recognized National Guard". In so holding, the Court of Claims refused to follow the uniform legislative, executive and judicial interpretation of the phrase "federally recognized National Guard" as meaning the National Guard as organized and recognized by the Federal government pursuant to the National Defense Act of 1916. Instead, resorting to a dictionary definition of "recognition" and moved by sentiment, the Court of Claims concluded that the Organized Militia had been "federally recognized" by the Dick Act of 1903 (App., *infra,* p. 19). Indeed, by its decision the Court of Claims has accomplished a change in the 1948 retirement statute which, without a single dissent, Congress specifically refused to make in 1949. By extending from 1916 to 1903 the period of National Guard service which may be counted for retirement purposes, the decision below makes retired pay available to hundreds of officers who served in the National Guard between 1903 and 1916, and will increase the retired

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[2] Until Title III of P.L. 810 provided retirement benefits for members of reserve components, they were only entitled to disability benefits, and then only for injuries incurred in the line of duty while performing military service. S. Rep. 1543, 80th Cong., 2d Sess., p. 9; H. Rep. 816, 80th Cong., 1st Sess., p. 9; 94 Cong. Rec. 2433, March 9, 1948.

pay of hundreds more, at an estimated annual cost to the United States of more than $1,000,000.[3]

1. The decision below is clearly erroneous in that it fails to treat the term "federally recognized National Guard" as words of art by which Congress specified service in the National Guard as recognized by the Federal Government pursuant and subsequent to the National Defense Act of June 3, 1916.

The Dick Act of 1903 dealt with the organization and training of the "Organized Militia." The concept of Federal "recognition" of Militia or National Guard units or personnel first appeared in the National Defense Act of 1916, as in Sections 70, 73, 74, 75 and 93 (App. pp. 25-29). The words "federal recognition" were defined precisely in Section 148 of the National Guard Regulations issued by the Militia Bureau of the War Department in 1919 as "the acceptance by the Federal Government as National Guard, of officers or a body of enrolled officers and men who have complied with the provisions of the act of June 3, 1916, [the National Defense Act] and who are entitled to the benefits of the act" (App. p. 40).

Congress has adopted this administrative definition of the "federally recognized National Guard" in that it has consistently drawn a distinction between service in the Organized Militia prior to the National Defense Act and service in the National Guard subsequent to that Act. Thus, in the Act of

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[3] See the President's message vetoing H.R. 5508, 81st Cong., 1st Sess., 95 Cong. Rec. 11135, estimating the additional annual cost at over $1,000,000.

June 10, 1922 (42 Stat. 625, 627), Congress authorized officers in the service on June 30, 1922 to count in computing their longevity pay "75 per centum of all other periods of time during which they have held commissions as officers of the Organized Militia between January 21, 1903, and July 1, 1916, or of the National Guard * * * since June 3, 1916, * * *." Similarly, in Section 3 of the Pay Readjustment Act of 1942 (56 Stat. 359, 360), Congress provided that for pay purposes officers "shall be credited with full time for all periods during which they have held commissions as officers * * * in the Organized Militia prior to July 1, 1916, or in the National Guard, National Guard of the United States * * *." And in dealing with the same subject in Section 202 of the Career Compensation Act of 1949 (63 Stat. 807), Congress again distinguished between service in the Organized Militia prior to July 1, 1916, and service in the National Guard. That is, in legislating with respect to officers' pay and benefits, Congress has regularly referred to service in the National Guard or militia prior to the National Defense Act of 1916 as service in the "Organized Militia".

By the 1933 amendments to the National Defense Act (App. pp. 31-38), Congress made even clearer what it meant by the "federalized" National Guard. Section 71(a) of the National Defense Act was amended to provide that:

> (a) "National Guard" or "National Guard of the several States, Territories, and the Dis-

> trict of Columbia" means that portion of the Organized Militia of the several States, Territories, and the District of Columbia, active and inactive, federally recognized as provided in this Act and organized, armed, and equipped in whole or in part at Federal expense and officered and trained under paragraph 16, section 8, article I of the Constitution.

The term "federally recognized National Guard" finds its obvious meaning in Section 93 of the 1916 Act which provides that inspection reports made to the Secretary of War as to compliance with the standards and requirements of the *1916 Act* "shall serve as the basis * * * for determining what organization and individuals shall be considered as constituting parts of the National Guard within the meaning of this Act" (App. pp. 28-29).

Also, the concept of Federal recognition of the National guard has been accepted uniformly by the courts,[4] the executive agencies,[5] and by com-

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[4] *Sweetser* v. *Emerson*, 236 Fed. 161 (C.A. 1, 1916), certiorari dismissed, 243 U.S. 660; *United States ex rel. Gillett* v. *Dern*, 74 F. 2d 485 (C.A. D.C.); *Hurley* v. *United States ex rel. Gladman*, 47 F. 2d 431 (C.A. D.C.); *Bianco* v. *Austin*, 204 App. Div. (N.Y.) 34 (1922). The procedure for federal recognition is described in *Gaston* v. *United States*, 34 A. 2d 353, 354, 356 (Mun. Ct. App., 1943), affirmed, 143 F. 2d 10 (C.A. D.C.), certiorari denied, 322 U.S. 764, in the light of the National Guard Regulations.

[5] See *Gaston* v. *United States, supra;* National Guard Regulations (1919 edition) Title E, pars. 145-150, 152, 153; Annual Report of the Acting Chief of the Militia Bureau relating to the National Guard and the United States Guards, 1918, p. 33, 36-37; see also Special Findings of Fact 13-15, *United States* v. *Partridge*, No. 250, this Term, R. 16-18.

mentators[6] as Federal acceptance of a National Guard or Militia unit as complying with the requirements of the National Defense Act of 1916 as to enlistment, contract, oaths, training, discipline and federal inspection.[7]

The error in the decision below is dramatically illustrated by the history of the 1949 amendments to the Army and Air Force Vitalization and Retirement Equalization Act here involved. The President who approved the Act of 1948 vetoed a 1949 bill—H.R. 5508, 81st Cong., 1st Sess.—which would have reached the same result as the Court of Claims' decision by adding to Section 306(c)(4) "and the National Guard or Organized Militia prior to June 3, 1916," on the grounds that it would impose huge fiscal burdens on the United States, broaden the base of the 1948 Act, and create an undesirable precedent. 95 Cong. Rec. 11135. No one in Congress, not even the sponsor of the amendment (95 Cong. Rec. 9667), was heard to urge that instead of being an extension of benefits to otherwise ineligible National Guard personnel, as the veto message stated, the amendment was in fact declaratory, although the veto message was carefully explained to both Houses and discussed

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[6] Ansell, *Legal and Historical Aspects of the Militia*, 26 Yale L.J. 471, 479-80 (April 1917); Wiener, *Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 201 (Dec. 1940); *Second Interim Report of the New York Joint Legislative Committee to Study the Military Law*, March 28, 1949 (Leg. Doc. (1949) No. 58) pp. 17-18.

[7] See Special Finding of Fact 9 (R. 3): "On December 22, 1921, the plaintiff received Federal recognition in the rank of Major General in the Pennsylvania National Guard."

in reports of both Houses (95 Cong. Rec. 11314, 12371; H. Rep. 1258, 81st Cong., 1st Sess.; S. Rep. 922, 81st Cong., 1st Sess.). On the contrary, both the sponsor and the National Guard officer instrumental in having it introduced admitted that they had been mistaken as to the interpretation and effect of H.R. 5508. 95 Cong. Rec. 11314. A new bill, H.R. 5929, 81st Cong., 1st Sess., omitting the provision to which the President objected, was promptly enacted. Act of September 7, 1949, 63 Stat. 693. By failing even to take a vote to override the President's veto or to take exception to his reasoning, Congress rather obviously concurred in his interpretation and views as to policy.

Specifically, this history again reveals that when Congress desires to refer to pre-1916 service it does so specifically, and that by the "federally recognized National Guard" it means the National Guard as constituted under and after the National Defense Act of 1916. That no Congressman contended that the language of the vetoed bill was declaratory of the 1948 Act, and that Congress took no action (cf. *Safeway Stores* v. *Bowles,* 145 F. 2d 836, 844 (E.C.A.), certiorari denied, 324 U.S. 847) is compelling proof that the Court of Claims misread Section 306(c)(3) and (4) of the 1948 Act. The Court of Claims stands alone, in opposition to Congresses both before (as in the Act of June 15, 1933) and after the 1948 Act, to the President who approved it (Cf. *Fleming* v. *Mohawk Co.,* 331 U.S. 111), to the other courts

which have dealt with federal recognition, to the executive agencies concerned with the administration of the statutes, and to the commentators who have studied the history and evolution of the legislation relating to the National Guard.[8]

Clearly, therefore, Congress has used the phrase "federally recognized National Guard" as words of art referring specifically to the National Guard as constituted under and after the National Defense Act of 1916. *Morissette* v. *United States,* 342 U.S. 246, 263; *Case* v. *Los Angeles Lumber Co.,* 308 U.S. 106, 115; *Suwannee Fruit and Steamship Co.* v. *Fleming,* 160 F. 2d 897, 899 (E.C.A.); Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Columbia L. Rev. 527, 537 (May 1947) When the phrase was transplanted into new legislation, it carried and was intended to carry with it the same meaning it had theretofore.

However, the Court of Claims found "recognition" of the National Guard in the federal controls which the Dick Act of 1903 applied to the Organized Militia. The error in this conclusion plainly lies in the fact that the Dick Act did not provide nor mention a federally recognized status. It was also futile for the Court of Claims to reason that the National Defense Act of 1916 was not a drastic innovation but that, contrary to

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[8] It begs the question to say that "If Congress, in defining Federal service in Section 306(c) had intended to limit such service to Guard service recognized since 1916, it could easily have said so." (R. 23). Cf. *Johnson* v. *United States,* 163 Fed. 30, 32 (C.A. 1). Congress was not aware of any ambiguity, as late as 1949.

the general understanding, it had been anticipated by the Dick Act of 1903, so that federal recognition existed under the Dick Act. But see Report of the Acting Chief of the Militia Bureau relative to the Organized Militia and National Guard of the United States, 1916, pp. 47-54; Ansell, *op. cit. supra.* The problem was not whether, objectively, the Federal Government "recognized" or controlled the militia in the Dick Act of 1903, or whether the Army fully appreciated the changes wrought by the Dick Act, for recognition in the sense of control is found in the Constitutional provisions relating to the militia (see Art. 1, Sec. 8, Clauses 15, 16; Art. II, Sec. 2, Cl. 1; *Houston* v. *Moore,* 5 Wheat. 1, 12; *Opinion of the Justices,* 14 Gray (Mass.) 614; Ansell, *Legal and Historical Aspects of the Militia,* 26 Yale L.J. 471, 476 (April 1917). The problem was whether in the special sense in which Congress has used the term, recognition had existed before 1916. Cf. *Fox* v. *Standard Oil Co.,* 294 U.S. 87, 96. Both at the time the National Defense Act of 1916 was enacted and thereafter there has been uniform acceptance that "federal recognition" had its inception in the Act of 1916,[9] when broader responsibilities were assumed by National Guardsmen in the face of new war hazards. *Sweetser* v. *Emerson,* 236 Fed. 161 (C.A. 1), certiorari dismissed, 243 U.S. 660.

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[9] The court below had "no doubt that the term 'federally recognized' took on certain specific meanings subsequent to the passage of the 1916 Act." (R. 23).

2. Even if the derivation of "federal recognition" left room for construction, the Court of Claims' opinion cannot be sustained. Since respondent was placed on the retired list in 1933 (R. 9, 13), the 1948 legislation could have afforded him no inducement to remain active in the Reserves (S. Rep. 1543, 80th Cong., 2d Sess., p. 9; H. Rep. 816, 80th Cong., 1st Sess., p. 11). His claim is, therefore, in the nature of a pension, *Dismuke* v. *United States,* 297 U.S. 167, 170; *Randolph* v. *United States,* 158 F. 2d 787 (C.A. 5), certiorari denied, 330 U.S. 839; H. Rep. 816, 80th Cong., 1st Sess., p. 11, and only doubtfully within the jurisdiction of the court below. 28 U.S.C. 1501. With respect to pensions, bounties, and subsidies, it has long been settled that policy considerations are closed to the courts. Caution and conservative interpretation are in order, for if the trial court's interpretation is narrow and not conducive to the public interest Congress may always liberalize the law promptly (*Kuhnert* v. *United States,* 127 F. 2d 824, 826 (C.A. 8)), whereas if the trial court's interpretation is too liberal and presents Congress with a *fait accompli,* legislation undoing the mischief and withdrawing the benefits may be impracticable or impossible. In departing from the rule of conservative interpretation (*Northern Pacific R. Co.* v. *United States,* 330 U.S. 248, 257; *United States* v. *Sherwood,* 312 U.S. 584, 590; *Blackfeather* v. *United States,* 190 U.S. 368, 376; *Price* v. *United States and Osage Indians,* 174 U.S. 373, 375; *District of Columbia* v. *Johnson,*

165 U.S. 330, 338; *Schillinger* v. *United States,* 155 U.S. 163, 166), the Court of Claims has embarked on the forbidden course of determining whether the claimants are deserving (R. 22, 24). This area of vagrant "equities" and predilections the courts have traditionally and wisely avoided (*White* v. *United States,* 191 U.S. 545, 551-2; *Dewey* v. *United States,* 178 U.S. 510, 520-1) especially where Congress by enacting detailed legislation, supplying its own glossary, and rejecting a proposal to liberalize in this very respect, has shown precisely how far it wished to go in liberalizing the meaning of Federal service for retirement benefit purposes. Cf. *Boston Sand & Gravel Co.* v. *United States,* 278 U.S. 41, 48; *Iselin* v. *United States,* 270 U.S. 245, 250-1; *Ebert* v. *Poston,* 266 U.S. 548. We submit that the rule of liberal construction is inapplicable (*United States* v. *Clough,* 55 Fed. 373, 375 (C.A. 6)) but the most liberal of constructions does not justify a departure from the Congressional intent. *Better Business Bureau* v. *United States,* 326 U.S. 279, 283.

3. There are now pending in the Court of Claims 26 cases involving the same question as the instant case. The broader consequences of the decision below were stated by the President in vetoing the 1949 bill as follows:

> * * * Further study, however, indicates that this section would increase the number of persons immediately eligible for retired pay by a known number of 250, and would, by crediting

> additional years of non-Federal service to certain personnel now on the retired list, increase the pay of 650 others. These costs would total $412,300 per year. I am advised that as many as 500 additional persons might also be made immediately eligible for retirement and that this annual cost might amount to $656,000. Thus, the unexpected cost of this section might reach a maximum annual figure of $1,068,300 for persons already of retirement age. Data are not available at this time from which an estimate can be made as to the number of other persons not yet of retirement age who, through the granting of additional years of service credit, would become eligible for retirement or an increased amount of retired pay on reaching the age of 60 years. Hence, the costs of prospective payments to this group cannot be estimated.[10]

The difficulties in the way of "divesting" benefits are serious if not insuperable. Review and correction by this Court are imperatively required if the Court of Claims is to pass upon claims of this character with appropriate regard for established words of art in this field, for the legislative history, and for the principle of conservative interpretation of legislation imposing liabilities upon the United States.[11]

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[10] 95 Cong. Rec. 11135.

[11] Cf. *United States* v. *Zazove*, 334 U.S. 602, 617; *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

AUGUST, 1952.

APPENDIX

Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, 1087, provides in pertinent part as follows:

> Sec. 302. (a) Any person who, upon attaining or having attained the age of sixty years, has performed satisfactory Federal service as defined in this section in the status of a commissioned officer, warrant officer, flight officer, or enlisted person in the Army of the United States or the Air Force of the United States, including the respective reserve components thereof, and also including the federally recognized National Guard prior to 1933 . . . and has completed an aggregate of twenty or more years of such satisfactory service in any or all of the aforesaid services, shall, upon application therefor, be granted retired pay: *Provided,* That for the purposes of this section the last eight years of qualifying service for retirement under this title must have been service as a member of a reserve component except that any member of a reserve component of the Air Force of the United States shall be entitled to include service as a member of a reserve component of the Army of the United States performed on or prior to July 26, 1949: *Provided further,* That for the purposes of this subsection, simultaneous service as a member of a reserve component and as a member of the Regular Army, Navy, Air Force, or Marine Corps, shall not be deemed to be service in a reserve component: *Provided further,* That no person who was a member of a reserve

component on or before August 15, 1945, shall be eligible for retirement benefits under this title unless he performed active Federal service during any portion of either of the two periods beginning April 6, 1917, and ending November 11, 1918, and beginning September 9, 1940, and ending December 31, 1946. [10 U.S.C., Supp. V, 1036a (a).]

* * * * *

(c) Each year of service as a member of a reserve component prior to the enactment of this Act shall be deemed to be a year of satisfactory Federal service for the purposes of this section, subject to the provisions of subsection (e) of section 306 of this Act. [10 U.S.C., Supp. V, 1036a (c).]

(d) Application for retirement with pay made pursuant to this section shall be submitted to the Secretary of the service in which the applicant last served or is serving at the time of such submission. [10 U.S.C., Supp. V, 1036a (d).]

* * * * *

Sec. 306. For the purposes of this title—

(a) The term "Federal service" shall be deemed to include all active Federal service and all service in a reserve component other than active Federal service, or both, except as provided in (e) and (f) below. [10 U.S.C., Supp. V, 1036e (a).]

(b) Satisfactory Federal service or Federal service satisfactorily performed, as used in this title in referring to Federal service herein men-

tioned, shall be demed to mean that the person concerned shall have conformed to such standards and qualifications as may have been required of him. [10 U.S.C., Supp. V, 1036e (b).]

(c) Service in a reserve component, as used in this title, shall consist of service in the following organizations, and shall be deemed to be Federal service for the purposes of this title—

(1) the National Guard of the United States;

(2) the National Guard while in the service of the United States;

(3) the federally recognized National Guard prior to 1933;

(4) a federally recognized status in the National Guard prior to 1933; * * * [10 U.S.C., Supp. V, 1036e(c).]

* * * * *

(d) The term "active Federal service" shall include all periods of annual training duty and all prescribed periods of attendance at such service schools as have been, or may be designated as such by the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force for their respective services, or by law, or any other period of time when ordered to active duty under competent Federal orders. [10 U.S.C., Supp. V, 1036e(d).]

(e) With respect to personnel of the Army or the Air Force, service in the inactive National Guard or Air National Guard, in a nonfederally recognized status in the National Guard or Air National Guard, or in an in-

active Reserve section of the Officers' Reserve Corps or an inactive officers' section of the Air Force Reserve shall not be deemed to be Federal service. [10 U.S.C., Supp. V, 1036e(e).]

(f) Subject to the provisions of subsection (d) hereof, service on the Honorary Retired List of the Naval and Marine Corps Reserves shall not be deemed to be Federal service. [10 U.S.C., Supp. V, 1036e(f).]

Sec. 307. The Secretary of the Army with respect to personnel of the Army, the Secretary of the Navy with respect to the personnel of the Navy and Marine Corps, and the Secretary of the Air Force with respect to personnel of the Air Force, are authorized to prescribe such rules, regulations, and procedures as they may deem necessary to effectuate the provisions of this title. [10 U.S.C., Supp. V, 1036f.]

The Dick Act of January 21, 1903, 32 Stat. 775, provides in pertinent part as follows:

CHAP. 196.—An Act To promote the efficiency of the militia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes—the

organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the laws of the respective States or Territories, and the remainder to be known as the Reserve Militia.

* * * * *

Sec. 3. That the regularly enlisted, organized, and uniformed active militia in the several States and Territories and the District of Columbia who have heretofore participated or shall hereafter participate in the apportionment of the annual appropriation provided by section sixteen hundred and sixty-one of the Revised Statutes of the United States, as amended, whether known and designated as National Guard, militia, or otherwise, shall constitute the organized militia . The organization, armament, and discipline of the organized militia in the several States and Territories and in the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular and Volunteer Armies of the United States, within five years from the date of the approval of this Act: *Provided,* That the President of the United States, in time of peace, may by order fix the minimum number of enlisted men in each company, troop, battery, signal corps, engineer corps, and hospital corps: *And provided further,* That any corps of artillery, cavalry and infantry existing in any of the States at the passage of the Act of May eighth, seventeen hundred and ninety-two, which, by the laws, customs or

usages of the said States have been in continuous existence since the passage of said Act under its provisions and under the provisions of Section two hundred and thirty-two and Sections sixteen hundred and twenty-five to sixteen hundred and sixty, both inclusive, of Title sixteen of the Revised Statutes of the United States relating to the Militia, shall be allowed to retain their accustomed privileges, subject, nevertheless, to all other duties required by law in like manner as the other Militia.

Sec. 4. That whenever the United States is invaded, or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable, with the other forces at his command, to execute the laws of the Union in any part thereof, it shall be lawful for the President to call forth, for a period not exceeding nine months, such number of the militia of the State or of the States or Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose to such officers of the militia as he may think proper.

Sec. 5. That whenever the President calls forth the militia of any State or Territory or of the District of Columbia to be employed in the service of the United States, he may specify in his call the period for which such service is required, not exceeding nine months, and the militia so called shall continue to serve during

the term so specified, unless sooner discharged by order of the President.

* * * * *

Sec. 12. That there shall be appointed in each State, Territory and District of Columbia, an Adjutant-General, who shall perform such duties as may be prescribed by the laws of such State, Territory, and District, respectively, and make returns to the Secretary of War, at such times and in such form as he shall from time to time prescribe, of the strength of the organized militia, and also make such reports as may from time to time be required by the Secretary of War. That the Secretary of War shall, with his annual report of each year, transmit to Congress an abstract of the returns and reports of the adjutants-general of the States, Territories, and the District of Columbia, with such observations thereon as he may deem necessary for the information of Congress.

* * * * *

Sec. 14. That whenever it shall appear by the report of inspections, which it shall be the duty of the Secretary of War to cause to be made at least once in each year by officers detailed by him for that purpose, that the organized militia of a State or Territory or of the District of Columbia is sufficiently armed, uniformed, and equipped for active duty in the field, the Secretary of War is authorized, on the requisition of the governor of such State or Territory, to pay to the quartermaster-general thereof, or to such other officer of the militia of said State as

the said governor may designate and appoint for the purpose, so much of its allotment out of the said annual appropriation under section sixteen hundred and sixty-one of the Revised Statutes as amended as shall be necessary for the payment, subsistence, and transportation of such portion of said organized militia as shall engage in actual field or camp service for instruction, and the officers and enlisted men of such militia while so engaged shall be entitled to the same pay, subsistence, and transportation or travel allowances as officers and enlisted men of corresponding grades of the Regular Army are or may hereafter be entitled by law, and the officer so designated and appointed shall be regarded as a disbursing officer of the United States, and shall render his accounts through the War Department to the proper accounting officers of the Treasury for settlement, and he shall be required to give good and sufficient bonds to the United States, in such sums as the Secretary of War may direct, faithfully to account for the safe-keeping and payment of the public moneys so intrusted to him for disbursement.

Sec. 15. That the Secretary of War is hereby authorized to provide for participation by any part of the organized militia of any State or Territory on the request of the governor thereof in the encampment, maneuvers, and field instruction of any part of the Regular Army at or near any military post or camp or lake or seacoast defenses of the United States. In such case the organized militia so partici-

pating shall receive the same pay, subsistence, and transportation as is provided by law for the officers and men of the Regular Army, to be paid out of the appropriation for the pay, subsistence, and transportation of the Army: *Provided,* That the command of such military post or camp and of the officers and troops of the United States there stationed shall remain with the regular commander of the post without regard to the rank of the commanding or other officers of the militia temporarily so encamped within its limits or in its vicinity.

The National Defense Act of June 3, 1916, Ch. 134, 39 Stat. 166, provides in pertinent part as follows:

Sec. 57. COMPOSITION OF THE MILITIA.—The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.

Sec. 58. COMPOSITION OF THE NATIONAL GUARD.—The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years organized, armed, and equipped as hereinafter provided,

and of commissioned officers between the ages of twenty-one and sixty-four years.

* * * * *

Sec. 69. ENLISTMENTS IN THE NATIONAL GUARD.—Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: *Provided,* That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act.

Sec. 70. FEDERAL ENLISTMENT CONTRACT.—Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligation, the enlisted man shall not be recognized as a member of the National Guard until he shall have signed an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given

for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this —— day of ——, 19—, as a soldier in the National Guard of the United States and of the State of ——, for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of ——, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the governor of the State of ——, and of the officers appointed over me according to law and the rules and articles of war."

Sec. 71. Hereafter all men enlisting for service in the National Guard shall sign an enlistment contract and take and subscribe to the oath prescribed in the preceding section of this Act.

* * * * *

Sec. 73. FEDERAL OATH FOR NATIONAL GUARD OFFICERS.—Commissioned officers of the National Guard of the several States, Territories, and the District of Columbia now serving under commissions regularly issued shall continue in office, as officers of the National Guard, without the issuance of new commissions: *Provided,* That said officers have taken, or shall take and subscribe to the following oath of office: "I, —— ——, do solemnly swear

that I will support and defend the Constitution of the United States and the constitution of the State of ——, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the President of the United States and of the governor of the State of ——; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office of —— in the National Guard of the United States and of the State of —— upon which I am about to enter, so help me God."

Sec. 74. QUALIFICATIONS FOR NATIONAL GUARD OFFICERS.—Persons hereafter commissioned as officers of the National Guard shall not be recognized as such under any of the provisions of this Act unless they shall have been selected from the following classes and shall have taken and subscribed to the oath of office prescribed in the preceding section of this Act: Officers or enlisted men of the National Guard; officers on the reserve or unassigned list of the National Guard; officers, active or retired, and former officers of the United States Army, Navy, and Marine Corps; graduates of the United States Military and Naval Academies and graduates of schools, colleges, and universities where military science is taught under the supervision of an officer of the Regular Army, and, for the technical branches and staff corps or depart-

ments, such other civilians as may be especially qualified for duty therein.

Sec. 75. The provisions of this Act shall not apply to any person hereafter appointed an officer of the National Guard unless he first shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall prescribe. The examination to determine such qualifications for commission shall be conducted by a board of three commissioned officers appointed by the Secretary of War from the Regular Army or the National Guard, or both.

Sec. 93. INSPECTIONS OF THE NATIONAL GUARD.—The Secretary of War shall cause an inspection to be made at least once each year by inspectors general, and if necessary by other officers, of the Regular Army, detailed by him for that purpose, to determine whether the amount and condition of the property in the hands of the National Guard is satisfactory; whether the National Guard is organized as hereinbefore prescribed; whether the officers and enlisted men possess the physical and other qualifications prescribed; whether the organization and the officers and enlisted men thereof are sufficiently armed, uniformed, equipped, and being trained and instructed for active duty in the field or coast defense, and whether the records are being kept in accordance with the requirements of this Act. The reports of such inspections shall serve as the basis for deciding as to the issue to and retention by the National Guard of the military property

provided for by this Act, and for determining what organization and individuals shall be considered as constituting parts of the National Guard within the meaning of this Act.

* * * * *

Sec. 111. NATIONAL GUARD WHEN DRAFTED INTO FEDERAL SERVICE—When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct. The commissioned officers of said organizations shall be appointed from among the members thereof, officers with rank not above that of colonel to be appointed by the President alone, and all other officers to be appointed by the President by and with the advice and consent of the Senate. Officers and enlisted men in the service of the United States under the

terms of this section shall have the same pay and allowances as officers and enlisted men of the Regular Army of the same grades and the same prior service.

Sec. 112. RIGHTS TO PENSIONS.—When any officer or enlisted man of the National Guard drafted into the service of the United States in time of war is disabled by reason of wounds or disability received or incurred while in the active service of the United States in time of war, he shall be entitled to all the benefits of the pension laws existing at the time of his service, and in case such officer or enlisted man dies in the active service of the United States in time of war or in returning to his place of residence after being mustered out of such service, or at any other time in consequence of wounds or disabilities received in such active service, his widow and children, if any, shall be entitled to all the benefits of such pension laws.

Sec. 116. NONCOMPLIANCE WITH FEDERAL ACT.—Whenever any State shall, within a limit of time to be fixed by the President, have failed or refused to comply with or enforce any requirement of this Act, or any regulation promulgated thereunder and in aid thereof by the President or the Secretary of War, the National Guard of such State shall be debarred, wholly or in part, as the President may direct, from receiving from the United States any pecuniary or other aid, benefit, or privilege authorized or provided by this Act or any other law.

The Act of June 15, 1933, amending the National Defense Act of June 3, 1916, as amended, Ch. 87, 48 Stat. 153, provides in pertinent part as follows:

> Sec. 4. That section 38 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:
>
> "Sec. 38. OFFICERS, NATIONAL GUARD OF THE UNITED STATES—All persons appointed officers in the National Guard of the United States are reserve officers and shall be commissioned in the Army of the United States. Such appointments in grades below that of brigadier general shall be made by the President alone, and general officers by and with the advice and consent of the Senate.
>
> "Officers in the National Guard of the United States shall be appointed for the period during which they are federally recognized in the same grade and branch in the National Guard: . . ."
>
> * * * * *
>
> Sec. 5. That section 58 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:
>
> "Sec. 58. COMPOSITION OF THE NATIONAL GUARD AND THE NATIONAL GUARD OF THE UNITED STATES.—The National Guard of each State, Territory, and the District of Columbia shall consist of members of the militia voluntarily enlisted therein, who upon original en-

listment shall be not less than eighteen nor more than forty-five years of age, or who in subsequent enlistment shall be not more than sixty-four years of age, organized, armed, equipped, and federally recognized as hereinafter provided, and of commissioned officers and warrant officers who are citizens of the United States between the ages of twenty-one and sixty-four years: *Provided,* That former members of the Regular Army, Navy, or Marine Corps under sixty-four years of age may enlist in said National Guard.

"The National Guard of the United States is hereby established. It shall be a reserve component of the Army of the United States and shall consist of those federally recognized National Guard units, and organizations, and of the officers, warrant officers, and enlisted members of the National Guard of the several States, Territories, and the District of Columbia, who shall have been appointed, enlisted and appointed, or enlisted, as the case may be, in the National Guard of the United States, as hereinafter provided, and of such other officers and warrant officers as may be appointed therein as provided in section 111 hereof: *Provided,* That the members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law, and, in time of peace, they shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States, Territories, and the District of Columbia, as provided in this Act: *And provided further,* That under such regu-

lations as the Secretary of War shall prescribe, noncommissioned officers, first-class privates, and enlisted specialists of the National Guard may be appointed in corresponding grades, ratings, and branches of the National Guard of the United States, without vacating their respective grades and ratings in the National Guard."

* * * * *

Sec. 9. That said Act be amended by adding section 71 thereto, as follows:

"Sec. 71. DEFINITIONS.—In this Act, unless the context or subject matter otherwise requires—

"(a) 'National Guard' or 'National Guard of the several States, Territories, and the District of Columbia' means that portion of the Organized Militia of the several States, Territories, and the District of Columbia, active and inactive, federally recognized as provided in this Act and organized, armed, and equipped in whole or in part at Federal expense and officered and trained under paragraph 16, section 8, article I of the Constitution.

"(b) 'National Guard of the United States' means a reserve component of the Army of the United States composed of those federally recognized units and organizations and persons duly appointed and commissioned in the active and inactive National Guard of the several States, Territories, and the District of Columbia, who have taken and subscribed to the oath of office prescribed in section 73 of this Act, and who have been duly appointed by the President in the National Guard of the

United States, as provided in this Act, and of those officers and warrant officers appointed as prescribed in sections 75 and 111 of this Act, and of those persons duly enlisted in the National Guard of the United States and of the several States, Territories, and the District of Columbia who have taken and subscribed to the oath of enlistment prescribed in section 70 of this Act."

* * * * *

Sec. 11. That section 73 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"Sec. 73. OATHS OF NATIONAL GUARD OFFICERS—APPOINTMENT IN THE NATIONAL GUARD OF THE UNITED STATES.—Commissioned officers and warrant officers of the National Guard of the several States, Territories, and the District of Columbia and in the National Guard of the United States shall take and subscribe to the following oath of office:

"I, —— ——, do solemnly swear that I will support and defend the Constitution of the United States and the constitution of the State of —— against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the President of the United States and of the Governor of the State of ——; that I make this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office

of —— in the National Guard of the United States and the State of —— upon which I am about to enter, so held me God.

"The President is authorized to appoint in the same grade and branch in the National Guard of the United States any person who is an officer or warrant officer in the National Guard of any State, Territory, or the District of Columbia and who is federally recognized in that grade and branch: *Provided,* That acceptance of appointment in the same grade and branch in the National Guard of the United States, by an officer of the National Guard of a State, Territory, or the District of Columbia, shall not operate to vacate his State, Territory, or District of Columbia National Guard office.

"Officers or warrant officers of the National Guard who are in a federally recognized status on the date of the approval of this Act shall take the oath of office herein prescribed and shall be appointed in the National Guard of the United States in the same grade and branch without further examination, other than physical, within a time limit to be fixed by the President, and shall in the meantime continue to enjoy all the rights, benefits, and privileges conferred by this Act."

Sec. 12. That section 75 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"Sec. 75. The provisions of this Act shall not apply to any person hereafter appointed as an officer of the National Guard unless he first

shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall prescribe. The examination to determine such qualifications for appointment shall be conducted by a board of three commissioned officers appointed by the Secretary of War from the Regular Army or the National Guard of the United States, or both. The examination herein provided for may be held prior to the original appointment or promotion of any individual as an officer or warrant officer and if the applicant has been found qualified, he may be issued a certificate of eligibility by the Chief of the National Guard Bureau, which certificate, in the event of appointment or promotion within two years to the office for which he was found qualified, shall entitle the holder to Federal recognition without further examination, except as to his physical condition.

"Upon being federally recognized such officers and warrant officers may be appointed in the National Guard of the United States."

Sec. 13. That section 76 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"Sec. 76. WITHDRAWAL OF FEDERAL RECOGNITION—Under such regulations as the President shall prescribe the capacity and general fitness of any officer or warrant officer of the National Guard of the several States, Territories, and the District of Columbia for continued Federal recognition may at any time be

investigated by an efficiency board of officers senior in rank to the officer under investigation, appointed by the Secretary of War from the Regular Army or the National Guard of the United States, or both. If the findings of said board be unfavorable to the officer under investigation and be approved by the President, Federal recognition shall be withdrawn and he shall be discharged from the National Guard of the United States. Federal recognition may be withdrawn by the Secretary of War and his appointment in the National Guard of the United States may be terminated when an officer or warrant officer of the National Guard of any State, Territory, or the District of Columbia has been absent without leave for three months."

Sec. 14. That section 77 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"Sec. 77. ELIMINATION AND DISPOSITION OF OFFICERS OF THE NATIONAL GUARD OF THE UNITED STATES.—The appointments of officers and warrant officers of the National Guard may be terminated or vacated in such manner as the several States, Territories, or the District of Columbia shall provide by law. Whenever the appointment of an officer or warrant officer of the National Guard of a State, Territory, or the District of Columbia has been vacated or terminated, or upon reaching the age of sixty-four, the Federal recognition of such officer shall be withdrawn and he shall be dis-

charged from the National Guard of the United States: *Provided,* That under such regulations as the Secretary of War may prescribe upon termination of service in the active National Guard an officer of the National Guard of the United States may, if he makes application therefor, remain in the National Guard of the United States in the same grade and branch of service. When Federal recognition is withdrawn from any officer or warrant officer of the National Guard of any State, Territory, or the District of Columbia, as provided in section 76 of this Act, or upon reaching the age of sixty-four years, he shall thereupon cease to be a member thereof and shall be given a discharge certificate therefrom by the official authorized to appoint such officer."

NATIONAL GUARD REGULATIONS
WAR DEPARTMENT, MILITIA BUREAU, 1919

95. The location of the units and headquarters of the National Guard, within their respective borders, will be fixed by the governors of States and Territories. **After Federal recognition has been extended to a unit, it has a Federal status in addition to its State status and no change of station will be made without the express authority of the Secretary of War.** (*Changes No. 1, December 18, 1919.*)

* * * * *

E. Organization of New Units and Procedure Governing the Extending of Federal Recognition Thereto

145. The National Guard consists of the regularly enlisted Militia between the ages of 18 and 45 years, and of commissioned officers between the ages of 21 and 64 years, organized, armed and equipped as provided for in these regulations, and recognized by the War Department as National Guard under the provisions of the act of Congress of June 3, 1916.

146. The act of June 3, 1916, is designed to give Federal aid and assistance and a certain amount of supervision from the Federal Government, in the organization and training of National Guard troops in the various States, with a view of providing them with a suitable military force for emergency use. The Federal Government retains the right to call the National Guard into Federal service when necessary, and to prescribe the particular unit or units which when combined will further the formation of higher tactical units.

147. State troops by whatever name designated and officers of such forces, as well as officers of the Organized Militia existing prior to the act of June 3, 1916, are not a part of the National Guard as contemplated by that act, unless they have specifically qualified for, and have received, recognition as National Guard by the War Department.

148. "Federal recognition" is defined as the acceptance by the Federal Government as National Guard, of officers or a body of enrolled officers and men who have complied with the provisions of the act of June 3, 1916, and who are entitled to the benefits of the act.

149. Certain conditions set forth hereafter are requisite for Federal recognition. The National Guard plan does not extend to or embrace the organization of new units, with no armories, no grouping of personnel according to localities, and no probable permanency of existence, but contemplates the development of a force, equipped and trained as far as possible in time of peace, which can be called upon for service in time of emergency.

150. Recognition of National Guard units will be extended by the Militia Bureau upon the following conditions:

(a) The organization shall be specifically authorized by the Militia Bureau.

(b) Suitable armories and storage facilities shall be provided by the State or Territory. This extends to and includes stable facilities for mounted troops and satisfactory housing for vehicles and armaments.

(c) There shall be proper localization of units, with the personnel drawn from the immediate vicinity.

(d) There shall be a reasonable probability that the organization can be maintained for a period of years, and kept alive by reenlistments and the acquisition of recruits.

(e) There shall be a reasonable certainty of the necessary number of assemblies for drill and training prescribed by the War Department.

(f) All units shall be organized under approved Tables of Organization, unless general exceptions are authorized by the Secretary of War in time of peace.

(g) Units shall be recruited to the strength prescribed by the Militia Bureau as necessary for Federal recognition.

No new units will be inspected for recognition unless organized pursuant to authorization from the Militia Bureau of the War Department.

* * * * *

152. Prior to the receipt of Federal recognition as National Guard, an organization or an individual belonging thereto has the status of State forces not yet a part of the National Guard. *(Changes No. 1, December 18, 1919.)*

153(d). An inspection by a Regular Army officer is required prior to Federal recognition. When a State is ready to have an organization inspected report will be made to the Militia Bureau, and the department commander will be directed by the War Department to cause the inspection to be made. The inspector will verify the members from the enlistment papers (Form 22-1, A.G.O.), check the proportion of one-year and three-year enlistments, and see that all the men presented have

been properly examined physically (Form 135-1, A.G.O.) and properly enlisted, and that their general appearance is satisfactory. He will make such inquiry and examination of the officers as will enable him to report upon their qualifications and suitability for the grade in which they have been commissioned, and will report his conclusions on each officer under head of "Remarks" on Form 113, M.B. He will base his recommendation as to recognition upon compliance by the organization with the conditions set forth above. Should the result of his inspection justify Federal recognition, the inspector will, upon its conclusion, administer the dual oath, unless there is conclusive proof that the enlistment oath has been administered by a National Guard officer who has been extended Federal recognition by the Militia Bureau, **or by a State military officer who has not yet received Federal recognition but who, under the statutes of the particular State, is authorized to administer oaths.** Upon completion of the inspection the **inspecting officer** will mail his report (Form 113, M.B.), with a complete roster of the company, troop, battery or detachment (Form 104, M.B.) and his recommendations, **together with the following, to the department commander for transmission to the Militia Bureau:**

(1) **Accomplished Form 95, Militia Bureau, for all officers;**

(2) **Accomplished Form 92, Militia Bureau, for all officers of the Medical, Dental, and Veterinary Corps;**

(3) **Accomplished Form 108, Militia Bureau, for all officers not enumerated in (2);**

(4) **Two letters of recommendation as to the character, morals, and habits of each applicant for original Federal recognition.**

(5) **Notice of appointment of each applicant for Federal recognition.**

(6) **Accomplished Oath of Office (Form 337-1, A.G.O.) for all officers.**

On Form No. 113, W.D., M.B., under the heading "Remarks," information concerning the administration of the dual oath should be set forth fully. The name or names of the National Guard officer or officers administering the oaths will be stated. (*Changes No. 1, December 18, 1919.*)

153(f) Before receiving final Federal recognition officers will be required to pass such portion of the examination prescribed by the Militia Bureau as may be deemed expedient, which portion will in general include an inquiry into the candidate's antecedents, morals, and character, educational opportunities and qualifications, business and professional experience, conduct, efficiency, and soldierly habits while a member of the Regular, Militia, or Volunteer forces, and his probable efficiency and aptitude for the service. The elementary and professional examination will be completed when practicable.

NATIONAL GUARD
REGULATIONS No. 20

DEPARTMENT OF THE ARMY
Washington 25, D. C., 11 December 1947

COMMISSIONED OFFICERS

Section VI
Federal Recognition

24. Definition—Federal recognition is the action of the Department of the Army in acknowledging and recording that officers of the National Guard have met the qualifications and requirements prescribed by the National Defense Act, and regulations, and are thereby entitled to receive Federal pay and allowances.

25. Effective date of recognition.—Recognition is not complete until granted by the Department of the Army. It is effective from the date on which the requirements for recognition were met.

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No. 248

SEP 27 195
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

October Term, 1952

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

WILLIAM G. PRICE, JR.

On Petition for a Writ of Certiorari to The United States Court of Claims

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BRIEF FOR RESPONDENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Act of June 15, 1933, 48 Stat. 153 4
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MISCELLANEOUS:

National Guard Regulations (1919 ed.) 4
Senate Report No. 1543, June 8, 1948, 2 U.S. Code Congressional Service, 80th Cong. 2d Sess. 1948, pp. 2161, 2162 6
Hearings, Armed Services Committee, Vol. II, p. 3322 10
94th Cong. Rec., pt. II, 2484, 2488, 2490, 2487, 7711 .....11, 12
H. R. 5508, 81st Cong., 1st sess. 13

IN THE

Supreme Court of the United States

October Term, 1952

No. 248

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

WILLIAM G. PRICE, JR.

On Petition for a Writ of Certiorari to The United States Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION

The United States seeks to have this Court review and reverse the judgment of the Court of Claims awarding retired pay under Title III of the Army and Air Force Vitalization and Equalization Retirement Act of June 29, 1948, 62 Stat. 1081, 1087, to the respondent, an 83-year-old retired major general of the Pennsylvania National Guard with continuous service from 1886 to 1933 in the Guard and with active duty in the Spanish-American War, the Mexican Border Mobilization of 1916, and World War I, on the ground that the Court of Claims erred in holding that he

had completed 20 year of satisfactory Federal service as required by Section 302(a) of that Act.

OPINION BELOW

The opinion of the Court of Claims in question here (R. 12-25) is reported at 100 F. Supp. 310.

JURISDICTION

The jurisdiction of this Court is as stated in the Petition.

QUESTION PRESENTED

The single question presented is whether the respondent's service in the National Guard under the Dick Act of January 21, 1903, 32 Stat. 775, prior to the enactment of the National Defense Act of June 3, 1916, 39 Stat. 166, was service in "the federally recognized National Guard prior to 1933" or in "a federally recognized status in the National Guard prior to 1933" within the meaning of the language of Section 302(a) and Section 306(c) of Title III of the Army and Air Force Vitalization and Equalization Retirement Act of 1948, 62 Stat. 1081, 1087, 1089.[1]

The petitioner has seriously misstated the question presented. It asserts that the question is whether service in the militia before 1916 constitutes service in the "federally recognized National Guard" for the purpose of determining retired pay under the Retirement Act of 1948 (Petition, p. 2). The court below decided only that the respondent's service in the Pennsylvania National Guard from January 21, 1903, to June 3, 1916, under the Dick Act, 32 Stat. 775, was creditable for the purpose of establishing his eligibility for retired pay and of computing the rate of such pay under the Retirement Act of 1948. It did not have before it nor

[1] Title III of the Army and Air Force Vitalization and Equalization Retirement Act of 1948 is for convenience hereinafter referred to as "Retirement Act of 1948".

did it make any decision upon the broad subject of "service in the militia prior to 1916". The Dick Act provided for an Organized Militia to be known as the National Guard, a far different organization from the "militia" which under the Militia Act of 1792, 1 Stat. 271, effective until 1903, consisted of virtually every able-bodied male between 18 and 45 years of age. No contention was made before the Court of Claims and the Court did not assume to hold that the respondent's service in the militia prior to the Dick Act was service in the "federally recognized National Guard" for any purpose at all.

Furthermore, the court below specifically limited its decision to the *respondent's* service and did not extend its holding to service in the National Guard in general.[2] This narrow application of the decision is plain in the light particularly of the penultimate paragraph of the opinion of Chief Judge Jones for the majority (R. 24):

> Since 1886 the plaintiff had been a member of the National Guard. He is 82 years old. He has always responded to his country's call. In three different wars he has been a member of fighting units. He and the few others who are involved are fast approaching the purple stage and tinted glow of the sundown. A consistent and literal interpretation of the three acts results in a reasonable disposition of the controversy at least in so far as plaintiff is concerned. From the history, background, and development of this legislation we are convinced that the Congress intended that a soldier with his record of service should be included.

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[2] The Court of Claims entered opinions October 2, 1951, in the cases of *Waterbury*, No. 249, this Term, and *Partridge, Executrix*, No. 250, this Term, holding that the National Guard officers there involved were also entitled to count their service prior to June 3, 1916, for retirement pay purposes under the Retirement Act of 1948. The opinions in *Waterbury* and *Partridge, Executrix*, were based upon the court's conclusion that their facts were very similar to and involved the same question as the case herein and upon the stipulation of the parties that the disposition of the *Price* case should govern the other two cases. See Record, No. 249, p. 12, and Record, No. 250, pp. 20-21.

STATUTES INVOLVED

The pertinent provisions of the Retirement Act of 1948 and the Dick Act are set forth in the Appendix to the Petition (pp. 16-24). Certain provisions of the National Defense Act are indirectly involved, and these are also included in the Appendix to the Petition (pp. 24-33). Any possible remote bearing which the Act of June 15, 1933, 48 Stat. 153, and the National Guard Regulations of 1919 have upon the question presented is fully recognized by their extensive reproduction in the Appendix to the Petition (pp. 31-44).

STATEMENT

The respondent was born March 23, 1869. He enlisted in the Pennsylvania National Guard May 24, 1886. He served continuously therein until March 23, 1933, when he was retired with the rank of Major General upon attaining his 64th birthday. During his service in the National Guard, he served on active duty in the Army of the United States from May 11, 1898, to October 22, 1898, in the Spanish-American War; from July 1, 1916, to October 12, 1916, in the Mexican Border Mobilization; and from July 15, 1917, to May 15, 1919, in World War I (R. 12-13).

After the passage of the Dick Act January 21, 1903, the respondent was a colonel, 3rd Regiment Infantry, to April 3, 1910; a brigadier general, 1st Infantry Brigade, from April 4, 1910, to May 15, 1919; and a major general, 28th Division, from May 16, 1919, to his retirement March 23, 1933. During the period January 21, 1903, to June 3, 1916, he attended drills and target practices of the National Guard at least 648 times and attended National Guard encampments 108 days. Between 1920 and 1933, he attended drills and target practices of the Guard at least 795 times and encampments 320 days (R. 12-13).

On January 21, 1949, the respondent applied for retirement pay under the Retirement Act of 1948. His application was denied by The Adjutant General on the ground

that "you do not have the required [twenty] years of Federal service" (R. 13-14). He thereupon brought suit in the Court of Claims for retirement pay under the Retirement Act of 1948.

The Court of Claims held, in an opinion entered October 2, 1951, that the respondent's service in the National Guard after the enactment of the Dick Act of January 21, 1903, was "federally recognized", and, accordingly, was to be credited in determining his right to the rate of retirement pay under the Retirement Act of 1948. The plaintiff thus had more than the requisite twenty years of service. Judgment was entered in favor of the respondent for $2,565.55 representing the retired pay due him for the period January 21, 1948, to October 2, 1951, less the amount of his Spanish-American War pension for that period.

REASONS FOR OPPOSING THE WRIT

The decision below is clearly right, reflecting the intention of Congress expressed in the Retirement Act of 1948, to recognize the long and uncompensated service of the respondent as a member of the National Guard, a reserve component of the Army of the United States. Even if the decision might be wrong in some nice view of the law, it is of insufficient moment to require this Court to correct it. It applies to one officer and can serve as a precedent for only a fast-dwindling handful of officers with similar service in the distant years from 1903 to 1916. In any event, ample opportunity for relief from any improper effect of the decision rests in an approach by the dissatisfied executive agency to Congress.

I

The Decision Below is Right

The Court of Claims correctly interpreted the Retirement Act of 1948, holding that the respondent's service from January 21, 1903, to June 3, 1916, was "federally recog-

nized". Any contrary result would have been in the teeth of the purpose of Congress in providing retirement pay for federally recognized National Guard service to reward the respondent for long years of faithful service spent in the military service of his state and his country. In so according the Retirement Act of 1948 an effect worthy of its spirit, the Court of Claims followed the ordinary meaning of the language of the statute and refused to shackle the Act with senseless and inhumane limitations embodied in a forced and artificial definition of "federally recognized".

The retirement Act of 1948 was enacted to give longevity retirement benefits to members of the Reserve components of the Army predicated upon time spent on active duty and upon satisfactory service during periods of inactive duty. Senate Report No. 1543, June 8, 1948, 2 U. S. Code Congressional Service, 80th Congress, 2d Session, 1948, pp. 2161, 2162. The Act extended such benefits to persons 60 years of age or over, who had completed twenty or more years of satisfactory Federal service in the Army of the United States, including its reserve components. Section 302(a), Retirement Act of 1948, Appendix to Petition, p. 16. It provided that "satisfactory Federal service" should be deemed to mean that the person concerned should have conformed to such standards and qualifications as might have been required of him and that "Federal service" should be in (1) the National Guard of the United States; (2) the National Guard while in the service of the United States; (3) *the federally recognized National Guard prior to 1933*; or (4) *a federally recognized status in the National Guard prior to 1933.* Section 306(b) and (c), Retirement Act of 1948, Appendix to Petition, pp. 17-18.

Under the Dick Act of 1903, the National Guard was federalized for the first time. Its organization, armament, and discipline were required to be the same as that for the Regular Army. Section 3, Dick Act, Appendix to Petition, p. 20. The President was authorized to fix the minimum number of men in the various component units. Ibid. The

adjutants general of the various states were required to make reports of the strength of the respective Guards to the Secretary of War. Section 12, Dick Act, Appendix to Petition, p. 22. Whenever it appeared to the Secretary of War from reports of inspections that a Guard was sufficiently armed, uniformed, and equipped for active duty, the Secretary was authorized to pay, transport, and subsist the Guard while on field or camp service. Section 14, Dick Act, Appendix to Petition, p. 22. And there were many other incidents of Federal recognition expressly provided by the Dick Act, which the petitioner has elected not to emphasize to the Court through omitting any reference to or reproduction of them in its Petition and Appendix. For a single example, Section 18 provided that each state furnished with materials of war under a statute of Congress would require that its Guard should participate in practice marches or go into camps of instruction at least five consecutive days each year, and should assemble for drills and instructions not less than 24 times a year.

Manifestly, the Pennsylvania National Guard and the respondent, complying with all the requirements of the Dick Act, were "federally recognized" in any usual meaning of that term. But the petitioner says that no National Guard and no member of the National Guard, regardless of their full conformance with the Federal standards and their receipt of Federal pay and other Federal funds and assistance under the Dick Act, could have been "federally recognized" as that term is used in the Retirement Act of 1948. The petitioner says that this distortion of language is required because "Federal recognition" can refer only to such recognition under the National Defense Act of 1916, where the term was first used in a statute.

Nothing in the Retirement Act of 1948 evidences that Congress intended to limit its benefits only to service federally recognized under the National Defense Act. Other statutes extending Federal recognition to National Guard service have made no distinction between service under the

Dick Act and service under the National Defense Act of 1916. The Basic Pay Act of June 10, 1922, authorized credit for National Guard service both before and after 1916. Section 3, 42 Stat. 627. So with the Pay Readjustment Act of 1942, 56 Stat. 359, and many more.

The language of the Retirement Act of 1948 demonstrates quite plainly in one respect that Congress specifically intended to allow credit for such service. Section 306(c) provides that "service in the following organizations . . . shall be deemed to be Federal service for the purposes of this title—

(1) the National Guard of the United States;
(2) * * *
(3) the federally recognized National Guard prior to 1933;
* * * * * * *"

All service in the federally recognized National Guard *after* June 3, 1916, was in the National Guard of the United States. See Sections 70 and 73, National Defense Act of June 3, 1916, 39 Stat. 166, reproduced in Appendix to the Petition, pp. 25-27, whereby it is required for Federal recognition that enlisted men and officers of the National Guard take oaths, respectively, that "I do hereby acknowledge to have volutarily enlisted this ... day of ....., 19.., as a soldier in the National Guard of the United States ***," and "I, ..., ..., do solemnly swear that *** I will well and faithfully discharge the duties of the office of ..... in the National Guard of the United States ***."

As all Federally recognized National Guardsmen after June 3, 1916, were thus members of the National Guard of the United States, it is evident that the only reason why Congress granted credit for service in "the federally recognized National Guard prior to 1933" in addition to credit for service in "the National Guard of the United States" was to permit federally recognized National Guardsmen

prior to June 3, 1916, who were necessarily not members of the National Guard of the United States to retire and receive retirement pay. If the petitioner's argument were to be accepted, the legislative grant of credit for service in "the federally recognized National Guard prior to 1933" would cover only service in "the National Guard of the United States" for which credit had otherwise been expressly granted. A construction leading to such statutory redundancy will not be adopted where another construction is permissible. *Singer* v. *United States*, 323 U. S. 338 (1945).

None of the cases cited by the petitioner as authority for its proposition that "Federal recognition" must refer to such recognition under the National Defense Act of 1916 is apposite in any respect except *Sweetser* v. *Emerson*, 236 F. 161 (1916), cert. dismissed 243 U. S. 660. The *Sweetser* case is some authority, indeed, but against rather than for the contention of the petitioner.

Also, there has been no uniform acceptance by the military department itself that "Federal recognition" connotes only compliance with the standards of the National Defense Act of 1916.[3] The fact is that from June 29, 1948, to April, 1949, *the Department of the Army actually applied the Retirement Act of 1948 to require the counting of service in the National Guard prior to June 3, 1916, for retirement and retired pay purposes.* See the decision of the Comptroller General relating to this matter, 29 Comp. Gen. 520. Hundreds of officers were retired by the Secretary of the Army and received retired pay under the Act with full credit for such service. It was not until the spring of 1949, over nine months after the Act had been enacted, that the

[3] Disputing the petitioner's argument in this facet is Secretary of War Stimson who, as late as October 7, 1942, in a letter to the Comptroller General, posed a series of questions as to whether credit for pay purposes might be given to members of the Organized Militia for service "prior to July 1, 1916, if Federally recognized." See 22 Comp. Gen. 411, 418.

Army took its second and present view of the statute and then concluded that it had been wrong from the beginning. Many, if not most, of the actions now pending in the Court of Claims wherein the plaintiffs claim retired pay based upon service in the National Guard prior to 1916 are brought by officers who enjoyed such pay from June 29, 1948, to September, 1949. See, for example, *Dean*, C. Cls. No. 118-52; *Delamater*. C. Cls. No. 91-52; *Payne*, C. Cls. No. 167-52; *Rheinhart*, C. Cls. No. 114-52; and *Goodwyn*, C. Cls. No. 166-52.

But, more persuasive than all the argument as to what meaning Congress, the courts, and the executive had ascribed to "Federal recognition" is the patent showing of the Congressional hearings and debates that Congress in enacting the Retirement Act of 1948 did not intend to draw a line excluding National Guard service prior to June 3, 1916, from credit under that Act.

The Retirement Act of 1948 was the result of cooperation and agreement of Regulars, National Guard and Reserve. High-ranking officers, acting as spokesmen for the several components, appeared before the Committee, including policy officers of the General Staff of the Army. Vol. II, Hearings on H. R. 2744, 80th Congress, Committee on the Armed Services, found at page 3322 and throughout the hearings.

At the House Committee hearings a number of members of the House, who, though not members of the Committee, had apparently been invited to sit with the Committee, took part in the Committee hearings. It was apparent that all—members of the Committee and the invited members of the House—were in accord.

Representative Sikes, a member of the Committee, stated (p. 3378):

> "I believe that you [a witness representing the National Guard] will recall that our principal difficulty in obtaining passage of bills similar to this appeared to be the fact that service [past service] counted and so forth."

And he further said (p. 3378):

> "I assume that your organization feels that adequate recognition be given to those men who carried the load during the lean years and who have provided the nucleus for the expanding and training of our armed forces when war came."

It was emphasized by those who drafted and sponsored the bill that they did not consider any particular date or war determinative of who should be included; that they had refused so to specify. As said by them:

> "They refused to chop off officers because of an arbitrary date line."

Representative Sikes interrupted to say:

> "That was the position that we in the House took."

And Representative Brooks, also a member of the Committee, added (p. 3378):

> "Along that line, of course, unless you do recognize to some extent at least those who have served in the past, you are simply closing the door to the use of experience which has been accumulated in the past and you are simply looking to the future."

In debate—Representative Johnson, California, Chairman of the Subcommittee, stated (Vol. 94, Cong. Rec., 80th Cong., 2d Sess., Pt. II, p. 2484):

> "All past service counts, if satisfactory."

And, later, Mr. Johnson said (p. 2488):

> "With reference to past services, they [the costs] are so nominal that they do not amount to anything in the over-all cost of the bill."

To like effect were statements made by Representative Dorn (p. 2488); Representative Martin (p. 2488); and Representative Miller (p. 2490).[4]

No view appears to have been expressed to the contrary.

There was little Senate debate. Senator Maybank, in charge of the bill for the Armed Services Committee, filed a speech of his for the record wherein he observed that Reserve Officers (including the National Guard) were immediately available to augment the Regular Army in time of emergency, instancing the Mexican Border Mobilization. He went on to say (Cong. Rec. 80th Cong., 2d Sess., Vol. 94, Pt. II, p. 7711):

> "Reserves have always had to bear the brunt of combat service, but this Title [III] is not aimed *solely* at rewarding those men for past services. On the contrary, its primary purpose is to establish a long-range program. ***" (Emphasis supplied)

The respondent submits that the decision of the Court of Claims properly reflects the purpose of Congress to recognize the services of members of the National Guard when such services were rendered for the benefit of and were received by the United States in response to either the Dick Act or the National Defense Act of 1916. Accordingly, the petition for certiorari should be denied.

II

The Decision Presents No Issue of General Importance

The case herein is one of simple construction of a military retirement statute. Only one officer is directly involved, and the importance of the decision even to him is declining as his life draws rapidly to its close. How many other

[4] It was observed that in the war a majority of Army divisions were National Guard divisions (p. 2487). Incidentally, there was a prideful allusion in debate to the distinguished record of the 28th Division—the division which respondent commanded for many years.

officers may benefit from the decision is entirely conjectural. No one knows the number of officers surviving who performed service in the National Guard similar to respondent's now from 36 to 49 years ago. Necessarily they are few. Some of these never achieved sufficient rank or longevity so that their pay under the Retirement Act of 1948 would exceed their pensions under other statutes. Many have died since 1948, as did the original plaintiff in *Partridge, Executrix,* No. 250, this Term, and, unless these had applied for retirement pay, their rights have not survived.

The petitioner closes with an appeal to the Court to consider the "broader consequences" of the decision (Petition, p. 13). Those consequences, according to the petitioner, were stated by the President in vetoing H. R. 5508, 81st Cong., 1st Sess., in 1949. That bill was designed to permit retirement-pay credit under the Retirement Act of 1948 for all service in a "federally recognized status . . . in the National Guard or Organized Militia prior to June 3, 1916." Even assuming that the decision of the Court of Claims went so far as H. R. 5508, it is manifest that the effect of the decision below at the present time will be far less consequential than that of H. R. 5508 would have been over three years ago.[5]

And, whatever may be the effect of the decision of the Court of Claims, it is quite plain that the United States has every facility available for correcting any substantial error in it through Congress. That would seem, perhaps, to be the more efficacious route to travel unless, of course, it is that the decision does in truth conform to the will of Congress as the respondent is confident it does.

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[5] The respondent must refrain from any endeavor to impeach the President's facts as to the effect of H.R. 5508. He does so reluctantly for he doubts their accuracy and has made efforts to obtain the data underlying them. His efforts have been unsuccessful largely because the Army Department declines to make them available "pending this litigation."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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September 27, 1952